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No. 82-182

SUPREME COURT OF THE UNITED STATES

October Term 1982

PERSIO A. MALDONADO, GRACE HUTSON and JUDITH KOGAN,

Petitioners,

-v-

CARMEN RODRIGUEZ, TONY SPENCER, ALLEN K. HODGE, LANA R. CONNORS, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BOARD OF ELECTIONS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the requirement of New York State Election Law §6-134(2) that candidate nominating petitions be accompanied by a cover sheet indicating the office for which the nomination is being made, the name and residence of each candidate, the number of pages in the petition, and the number of signatures it contains, constitute an impermissible burden on any of petitioners' constitutional or Voting Act rights?

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STATEMENT OF THE CASE

This thoroughly ungrounded complaint has been found to be, in the words of the Second Circuit "completely without merit" by both that Court (petition for certiorari at 84a) and the District Court for the Southern District of New York (petition for certiorari at 71a-82a), as well as the New York State Court of Appeals (petition for certiorari at 66a-70a).

Petitioners champion the cause of a slate of candidates for political positions at the local district level. Their slate, which sought positions on the ballot through nominating petitions, was ruled off the ballot by the state courts for failure to comply with certain provisions of New York State's election laws, in force and unchanged for over 20

years (see opinion of the Second Circuit at 85a), which require that nominating petitions have cover sheets meeting certain prerequisites [New York Election Law §6-134(2) (McKinney's 1978), reproduced in the petition for certiorari at 4]. These requirements permit orderly computer processing of candidate submissions.

Petitioners' federal complaint, resting on claims under 42 U.S.C. §1983 and the Voting Rights Act, 42 U.S.C. §1973c, was dismissed by the U.S. District Court for the Southern District of New York (DUFFY, J.) on September 16, 1981 (petition for certiorari at 71a-82a), and the U.S. Circuit Court for the Second Circuit affirmed the District Court judgment on May 7, 1982 (petition for certiorari at 83a-88a).

REASONS FOR DENYING THE WRIT

The opinion of the Second Circuit concisely states the nature of the claims and the basis for its conclusion that the complaint is meritless, and one need do little more than briefly paraphrase that decision to demonstrate the inappropriateness of certiorari review in this Court. As this Court may determine, it is incorrect to say that either of the federal courts "relied heavily" on the state court decisions (petition for certiorari at 2). Their decisions are solidly grounded on federal law.

The claim under §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, was fatally deficient in that this provision does not apply except to changes in procedures from those existing on

November 1, 1968. As the cover sheet requirement is unchanged since that date, §1973c is inapplicable. The only actions which petitioners identified within the relevant time period were the decisions of the state courts in the suits their slate brought after being ruled off the ballot, which merely interpreted a precleared statute. This cannot support a Voting Rights Act claim, Gangemi v. Sclafani, 506 F.2d 570, 572 (2nd Cir. 1974).

Nor, where the law receives a uniform application, as the Second Circuit found that this one has, may a claim under 42 U.S.C. §1983 be made out without a showing of purposeful discrimination, Snowden v. Hughes, 321 U.S. 1, 8 (1944); Powell v. Power, 436 F.2d 84, 88 (2nd Cir. 1970); or serious fraud or interference with voting rights, Pettengill v. Putnam Co.

R-1 School Dist., 472 F.2d 121, 122 (8th Cir. 1973); Saxon v. Fielding, 614 F.2d 78, 79-80 (5th Cir. 1980); or wrongful advice of state officials, see Williams v. Sclafani, 444 F. Supp. 906 (S.D.N.Y.), aff'd 580 F.2d 1046 (2nd Cir. 1978).

Thus, the affirmance by the Second Circuit of the District Court's dismissal of both these claims was proper, in accord with well settled principles of law, and raises no matters worthy of review by this Court. None of the Rule 17 considerations supporting grant of the writ appear here.

Petitioners' other claims were not even thought fit to merit discussion in the Second Circuit's opinion (petition for certiorari at 87a).

A large portion of petitioners' brief supporting the petition for certiorari (Reasons for Granting Writ, petition for

certiorari at 15-19) advances a totally new argument which was not raised before either the District or the Circuit Court. Petitioners invite this Court to conclude that in New York State, too much of the state judiciary's resources are allocated to administration of the state's election laws, and that this Court should therefore void sections of that law so the state courts will have more time for other matters. No proper reason has been shown for such unprecedented intervention in local matters by this Court. In essence petitioners ask this Court to set judicial and legislative priorities for branches of the New York State government. A less appropriate role for this Court can scarcely be imagined, especially in light of the essentially frivolous nature of the legal claims asserted here.

Additionally, although this petition is brought in the names of Persio A. Maldonado, Grace Hutson, and Judith Kogan as petitioners, only Kogan appealed the order of the District Court to the Second Circuit. (See caption of Second Circuit opinion, petition for certiorari at 83a.) The remaining "petitioners", not parties to the appeal in the Second Circuit, have no standing to petition this Court for review of the Second Circuit's decision.

It should be noted that petitioner Kogan sought the position of a delegate to the state judicial nominating convention. The convention met in October 1981, and the candidates it nominated were elected to the New York Supreme Court on November 3, 1981. Thus, no effective relief could be accorded Kogan in any event, since she could hardly become a

delegate to a convention which has met and finished its work.

Insofar as Kogan may have standing as a voter to raise the matter of the exclusion of Maldonado and Hutson from the ballot for local Democratic district leader, we also note that the general election for which the district leader nominations were submitted took place on November 3, 1981, after the District Court denied the application for a preliminary injunction requiring that the petitioners' slate be put on the ballot.

CONCLUSION

The writ of certiorari should be denied.

Dated: August 24, 1982.

Respectfully submitted,

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